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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FELIX VALENTINE CALDERON,

Defendant and Appellant.

F057554

(Super. Ct. No. SUF30154)

**O P I N I O N**

APPEAL from a judgment of the Superior Court of Merced County. Brian L. McCabe, Judge.

Diane E. Berley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Daniel B. Bernstein and David A. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

During the early morning hours of March 5, 2005, appellant Felix Calderon was involved in an altercation between two groups of young men.[1] Appellant was punched. He pulled out a .22-caliber semiautomatic gun and fired six shots. One of the bullets struck Joe Garavito, killing him. Another bullet struck Randy Wunker and a third bullet hit Branden Ballinger. During search of appellant's residence officers seized .22-caliber and .38-caliber ammunition, Norteno gang paraphernalia and tattooing equipment. A gang expert testified appellant was a member of the "M Street Mob," which is a Norteno affiliated street gang. In response to a hypothetical conforming to the factual circumstances of these events, the gang expert testified the shooting and weapon/ammunition possession would benefit the gang. Appellant was found guilty after jury trial of one count of voluntary manslaughter and two counts of attempted voluntary manslaughter as lesser included offenses to the charged offenses of murder and attempted murder (counts 1-3); special allegations that he personally used a firearm during the commission of these crimes were found true. (Pen. Code, §§ 192, subd. (a), 664, 12022.5, subd. (a).) The jury also found appellant guilty of being a felon in possession of a firearm and of illegally possessing ammunition (count 4-5); street gang enhancement allegations attached to these crimes were found true. (§§ 12021, subd. (a)(1), 12316, subd. (b)(1), 186.22, subd. (b)(1)(A).) The court found a section 667.5, subdivision (b) enhancement allegation true. Street gang enhancement allegations attached to counts 1-3 were found not true. Appellant was sentenced to an aggregate term of 19 years imprisonment.

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[1] Unless otherwise specified all dates refer to 2005 and all statutory references are to the Penal Code.

Appellant challenges the sufficiency of the evidence supporting the true findings on the gang enhancements. He also raises two confrontation clause based evidentiary challenges and posits a related ineffective assistance claim. None of these arguments is persuasive; we will affirm.

## FACTS

On the evening of March 4 and early morning of March 5, a party was held at a home in Atwater located on Eucalyptus Street (the Eucalyptus house). The attendees included appellant, Ballinger, Humberto Garcia and Israel Resendez.

Ballinger and Garcia left the party and went to another home in Atwater.

Resendez stayed at the party. Sometime after midnight, he phoned one of the people who left the party. Resendez said that he had been "jumped" (meaning attacked and beaten) and asked for assistance.

At approximately 1:30 a.m., a group of young men, including Garavito, Ballinger, Wunker, Garcia and Zak Adams, got into two vehicles and drove back to the Eucalyptus house. Adams was armed with a .357-caliber handgun.[2] Ballinger testified he returned to the Eucalyptus house "[t]o defend" Israel. They were angry.

They saw Resendez and picked him up. He appeared upset. When Resendez was asked who jumped him, he pointed toward a group of young men, including appellant, who were standing in the front yard of the Eucalyptus house.

The two groups began arguing. Ballinger heard someone call out "Norte," and people said "stuff back."

Garavito asked Resendez to identify the people who jumped him. Resendez pointed out several people, including appellant.

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[2] A lockbox was found in Adam's bedroom. It contained a .357 revolver, bullets, a holster, digital scales, marijuana and packing material. The revolver was stolen from a gun shop.

Garavito punched appellant, knocking him backward.

Appellant pulled a .22-caliber semiautomatic gun out of his waistband and fired six shots. One of the shots struck Garavito in the chest. Ballinger and Wunker were also struck by bullets.

Ballinger and the rest of their group scattered. While Adams was running back toward the car, he pulled out his gun and fired five shots into the air.

Garavito fell to the ground and died.

Additional shot were fired; one hit a car window.

Some people stayed with Garavito until police arrived a few minutes later. Others, including Ballinger and Wunker, left.

Ballinger and Wunker were treated for gunshot wounds at a hospital.

Atwater Police Detective Armando Echevarria arrived at the Eucalyptus house around 2:00 a.m.[3] Officers from the Atwater Police Department and Merced County Sheriff's Department were present. A crime scene had been established and was barricaded with crime scene tape at several locations. Detective Echevarria identified crime scene photographs showing the location of the physical evidence, Garavito's body and blood patterns.

Atwater Police Sergeant Rene Mendoza was assigned to be the "find officer" at the crime scene. The find officer's duty is to locate, mark, collect and photograph items of evidence.

Sergeant Mendoza arrived around 3:00 a.m. He was assigned to locate and mark items of evidence and create a crime scene diagram. He located six .22-caliber shell casings and a pool cue outside the Eucalyptus house; a folding knife was found across

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[3] The prosecutor asked the court to deem Detective Echevarria the investigating officer. Defense counsel stated that he did not have any objection. The court acceded to the prosecutor's request.

the street. Sergeant Mendoza marked and measured these items. At Sergeant Mendoza's request, Deputies Buttrey and Clinton photographed and collected these items. They gave them to Sergeant Mendoza, who "turned them over to the originating officer which, I believe, was Officer Melton." The items were "later booked into evidence."

Sergeant Mendoza prepared a crime scene diagram. He authenticated and confirmed the accuracy of People's exhibit No. 127, which was a copy of this diagram. It depicted the locations of the shell casings and other physical evidence and their measured distances from a station line.

The residents of the Eucalyptus house were detained and the house was searched. The officers found .22-caliber and .32-caliber ammunition, photographs and a shoe box decorated with graffiti.

Appellant was arrested. His residence was searched and the following items were seized: (1) several Remington brand .22-caliber shells; (2) a rifle buttstock; (3) the end of a rifle barrel; (4) a metal handsaw; (5) two wire brushes used to clean a rifle; (6) four rounds of .38-caliber shells; (7) tattoo guns and Norteno gang-related stencils; (8) a number of photographs depicting appellant in the company of Nortenos who were flashing gang signs and wearing gang colors; and (9) a red wristband or headband with a large "N" in the middle of it.

Appellant was interviewed after his arrest. This interview was recorded and played for the jury. A transcription was provided to each of the jurors. Appellant said he attended the party at the Eucalyptus house. A fight broke out and he attempted to break it up. Then he saw people pulling out guns. They started firing. He hid inside the house. After the firing stopped, he left with some other people. He denied having a gun at the party. Appellant denied any knowledge of the gun pieces or ammunition found at his residence.

Dr. Wilkerson performed the autopsy on Garavito's body and prepared a written report.[4] The cause of death was a single gunshot wound to the chest. The testifying pathologist, Dr. Kohlmeier, observed from a photograph of Garavito's entry wound that there was a fair amount of soot around it. This suggested that the gun barrel was six to eight inches away from Garavito when he was shot.

Detective Echevarria attended Garavito's autopsy. The coroner handed him a .22-caliber long rifle slug that had been removed from Garavito's body.

The slug was analyzed by a Department of Justice criminalist who generated a report. The report confirmed the slug was .22 long rifle caliber.

A firearm examiner testified that the six shell casings found outside the Eucalyptus house were Remington brand .22 long rifle caliber. They were all fired from the same semiautomatic-type gun.

Merced Police Lieutenant Thomas Earl Trinidad gave expert gang testimony. He testified about the history and formation of the Nortenos and Surenos gangs. The two gangs are at war. Nortenos use the number 14 and the letter N as identifying symbols. Nortenos outnumber Surenos in Merced while Atwater is a Surenos stronghold.

Trinidad knew appellant from prior contacts and identified him in the courtroom. Appellant is a validated member of the "M Street Mob," which is a street level gang in Merced that was formed in the 1980's. The M Street Mob is primarily aligned as a Norteno gang. The M Street Mob associates with other Norteno-aligned gangs such as the Merced Ghetto Boys and the 11th Street Locs. Trinidad testified about numerous predicate offenses that were committed by six M Street Mob members, including one offense committed by appellant.

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[4] Dr. Wilkerson was unavailable to testify because he was recovering from surgery. Dr. Ruth Kohlmeier reviewed the report prepared by Dr. Wilkerson and testified at trial.

Trinidad testified about the significance of power within the gang subculture. Power is obtained through intimidation and fear. Gang members want to intimidate and cause others to fear them. Instilling fear increases their control. When a gang is feared, it is easier for gang members to commit crimes without being successfully prosecuted. Also, it makes it easier to recruit new gang members.

Trinidad also testified about the significance of respect within the gang subculture. Trinidad explained that gang members thrive on respect. "Any disrespect given to them, they're required by their culture, that subculture and that gang lifestyle, to retaliate and show that they fear no one and that they are going to not accept it from anybody, and they need to be feared and respected in the gang world in their subculture." Thus, if a gang member is not treated with the level of respect he believes is due, he will attack or hurt the person who disrespected him.

In response to a hypothetical matching the factual circumstances of the shooting, Trinidad testified that it would have been committed to benefit the gang because it would have been a response to perceived disrespect.

Trinidad also testified that the possession of a firearm and ammunition would have benefited the gang. He explained:

> "[¶] … It benefits them because that is the tool of the trade for gang members. The possession of that firearm is the symbol of their power. Countless, numerous pictures that I've looked [at over] the years of gang members all up and down the state of California, one of the things that's very prominent in a lot of those pictures is the gun. The gun is the tool of trade for gang members to commit violent acts in our community. They use it to trade for other guns or they use it to trade for drugs or they'll trade drugs or guns. It's an economy -- or it's a piece of property that's very desired in the gang lifestyle."

Appellant testified on his own behalf. He admitted that he lied to the police following his arrest.

Appellant also admitted violating the terms of his parole by possessing firearms and applying tattoos for Nortenos and Surenos gang members.

Appellant said that he had been an active Norteno gang member. However, while he was in prison he told the correctional officers he wanted out of the gang and went through the debriefing program. Appellant had to stay alert when he was released from prison and returned to Merced. People were trying to attack him.

Appellant said the Eucalyptus house is located in Surenos territory and he knew that he would have to be alert. During the party, appellant purchased a loaded .22-caliber semiautomatic Colt firearm for $80 from Andres Lopez, who is a Norteno member. Appellant intended to sell the gun for a profit.

Later that evening, a car pulled up and a group of people got out of the car and moved toward them. They were yelling and jumping. Someone was waving a gun around. A tall man falsely said appellant had hit him. Someone yelled, "[J]ust blast him, just blast him." He did not see a gun in Garavito's hand. Someone hit him and he stumbled, falling onto the grass. Then he heard a gunshot. Believing that his life was in danger, he drew his gun and began firing it. He did not aim at anyone in particular and was not attempting to kill anyone. He fired three shots while running toward a car to take cover. He felt bullets whistling past him. He fired three more shots and ran into the house. He did not yell "Norte" or "eñe." He threw the gun in a dumpster the next morning.

Detective Echevarria was recalled. He testified that a car belonging to appellant's sister had more than one bullet hole in it. A bullet slug was recovered from this car. The bullet fit the .357-caliber handgun recovered from the lockbox in Adam's bedroom. Investigating officers concluded that more than one gun was involved in the altercation.

## DISCUSSION

### I. There is adequate evidence supporting the gang enhancements attached to counts IV & V.

Appellant does not dispute the sufficiency of the evidence proving that in 2005 he was a member of M Street Mob, which is a Norteno-affiliated street level gang. Rather, he argues there is insufficient foundation supporting Lieutenant Trinidad's opinion testimony and, therefore, inadequate proof that the gun and ammunition were possessed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members …." (§ 186.22, subd. (b)(1).) We are not convinced. As will be explained, there is ample support for Trinidad's opinion testimony and the People satisfied their evidentiary burden.

#### A. The substantial evidence standard of review applies.

When reviewing a challenge to the sufficiency of the evidence, we assess the entire record in the light most favorable to the judgment below to determine whether it contains substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "This standard applies to a claim of insufficiency of the evidence to support a gang enhancement." (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) "The standard is the same, regardless of whether the prosecution relies mainly on direct or circumstantial evidence. [Citation.]" (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 352 (*Vazquez*).)

In applying the substantial evidence standard of review, the appellate court adopts all reasonable inferences and presumes in support of the judgment the existence of every fact that a jury reasonably could have deduced from the evidence. The trier of fact makes credibility determinations and resolves factual disputes. An appellate court

will not substitute its evaluation of a witness's credibility for that of the fact finder. "It is the jury, not this court, that must be convinced beyond a reasonable doubt that the gang enhancement allegation is true. [Citation.]" (*Vazquez, supra,* 178 Cal.App.4th at p. 352.)

### B. Section 186.22, subdivision (b)(1) did not require the People to prove appellant committed the substantive offense with the specific intent to facilitate additional and separate criminal conduct by gang members.

In relevant part, section 186.22, subdivision (b)(1) provides for a sentence enhancement when a defendant commits a felony "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members …."

In *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 (*Garcia*) and *Briseno v. Scribner* (9th Cir. 2009) 555 F.3d 1069 (*Briseno*), the Ninth Circuit held that the specific intent requirement of section 186.22, subdivision (b) requires some evidence supporting an inference that the defendant committed the crime with the specific intent to facilitate separate additional criminal conduct by gang members. The People are required to produce evidence describing "what criminal activity of the gang was … intended to be furthered" by the charged crime. (*Garcia, supra*, 395 F.3d at p. 1103; see also *Briseno, supra*, 555 F.3d at p. 1079.)

The Ninth Circuit has misinterpreted section 186.22, subdivision (b)(1). As lower federal court decisions, *Garcia* and *Briseno* are not binding on this court. (*People v. Hoag* (2000) 83 Cal.App.4th 1198, 1205.) No California Court of Appeal has accepted the Ninth Circuit's interpretation of section 186.22, subdivision (b)(1).

The California appellate courts that have considered this issue unanimously agree there is no statutory requirement that the "criminal conduct by gang members" referenced in section 186.22, subdivision (b)(1) must "be distinct from the charged

offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing." (*Vazquez, supra*, 178 Cal.App.4th at p. 354; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 19 (*Romero*); *People v. Hill* (2006) 142 Cal.App.4th 770, 774 (*Hill*).) *Vazquez* explains:

> "[¶] While our Supreme Court has not yet reached this issue, numerous California Courts of Appeal have rejected the Ninth Circuit's reasoning. As our colleagues noted in [*Romero, supra*, 140 Cal.App.4th at p. 19]: 'By its plain language, the statute requires a showing of specific intent to promote, further, or assist in "*any* criminal conduct by gang members," rather than *other* criminal conduct. (§ 186.22, subd. (b)(1), italics added.)' Thus, if substantial evidence establishes that the defendant is a gang member who intended to commit the charged felony in association with other gang members, the jury may fairly infer that the defendant also intended for his crime to promote, further or assist criminal conduct by those gang members. [Citation.]
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> "Like the *Romero* court, we reject the Ninth Circuit's attempt to write additional requirements into the statute. It provides an enhanced penalty where the defendant specifically intends to 'promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1).) There is no statutory requirement that this 'criminal conduct by gang members' be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing." (*Vazquez, supra*, 178 Cal.App.4th at pp. 353-354.)

For the reasons expressed in *Vazquez*, *Romero* and *Hill*, we reject the Ninth Circuit's interpretation of section 186.22, subdivision (b)(1).

**C. There is adequate foundation for Lieutenant Trinidad's opinions.**

Evidence that a crime would enhance a gang's status or reputation or that rival gangs or potential witnesses within the gang's territory would be intimidated, is sufficient to support a finding that the crime was "for the benefit of" the gang. (See *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1504-1506, 1511-1512 & *People v. Morales, supra,* 112 Cal.App.4th at p. 119.) Generally, the testimony of a single

witness is sufficient to prove a disputed fact. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) This topic is a proper subject for expert testimony. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1209.) An expert may rely on hearsay in forming his or her opinion. (*People v. Catlin* (2001) 26 Cal.4th 81, 137.) Yet, "'[l]ike a house built on sand, the expert's opinion is no better than the facts on which it is based.' [Citation.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

> "[¶] A gang expert's testimony alone is insufficient to find an offense gang related. [Citation.] '[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.' [Citation.]" (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.)

In this case, appellant admitted possessing a loaded .22-caliber semiautomatic Colt firearm and firing it six times during the altercation at the Eucalyptus house. Appellant further admitted possessing the Remington brand .22-caliber shells that were found at his residence. Six shell casings found outside the Eucalyptus house were Remington brand .22-caliber long rifle casings. The bullet slug that was removed from Garavito's body was .22 long rifle. Rifle parts and a handsaw were found at appellant's residence. This evidence directly connects the gun and the ammunition found at appellant's home to the manslaughter and attempted manslaughter.

In challenging the foundation for Trinidad's opinion, appellant fails to recognize the significance of the facts. Appellant not only possessed the firearm and .22-caliber ammunition, but he used the gun in an altercation -- killing one unarmed man and seriously injuring two other unarmed men.

Appellant testified that he pulled the gun out of his waistband and fired it six times after he was hit. This provides the evidentiary foundation necessary for

Trinidad's testimony that if a gang member is not treated with the level of respect he believes is due to him, he will attack or hurt the person who disrespected him.

Appellant testified he bought a loaded semiautomatic weapon at the party with the intent to sell it. This testimony provided an evidentiary foundation for Trinidad's testimony that guns are used as currency in the gang culture.

Alternatively, based on the rifle parts, .22-caliber ammunition and handsaw found at appellant's home, the jury could have concluded that appellant modified a rifle, loaded the weapon and brought it to the party. This evidence provides a foundation for Trinidad's opinion testimony about the significance of guns in the gang culture and the benefits they provide to gang members.

In support of this argument, appellant relies on *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*) and *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). Both of these cases are factually distinguishable. In neither *Ramon* nor *Killebrew* did the defendant admit personally possessing the firearm. Also, the firearm was not directly connected to other crimes that were committed by the defendant. Here, we are not confronted with a situation where the firearm and ammunition hypothetically could have been used in the commission of a crime. Rather, the firearm and ammunition were directly connected to a homicide committed by a gang member.

For these reasons, we hold there is an adequate factual basis for Trinidad's opinion testimony about a gang member's need to violently retaliate in response to disrespect and his testimony about the benefit of weapon possession to the gang and gang member.

We also conclude there is substantial evidence from which the jury reasonably could determine beyond a reasonable doubt that the gun and ammunition were possessed for the benefit of, at the direction of, or in association with the M Street Mob (a Norteno-affiliated gang), with the specific intent to promote, further, or assist in any

criminal conduct by gang members. Therefore, appellant's challenge to the sufficiency of the evidence supporting the gang enhancements attached to counts IV and V fails.

## II. The evidentiary challenges were forfeited.

Without defense objection, Dr. Kohlmeier testified about the contents of the autopsy report that was prepared by Dr. Wilkerson.

Also, the People did not call a person identified as "Officer Melton." Appellant asserts Melton was the first officer who responded to the crime scene. Appellant bases this claim on Sergeant Mendoza's testimony that he gave the physical evidence collected at the crime scene "to the originating officer which, I believe, was Officer Melton." Defense counsel did not object to the absence of Officer Melton as a prosecution witness or contend there was a gap in the chain-of-custody of the physical evidence collected at the crime scene.

Relying on *Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*) and *Crawford v. Washington* (2009) 541 U.S. 813 (*Crawford*), appellant argues admission of Dr. Kohlmeier's testimony about the contents of the autopsy report and the absence of testimony by Officer Melton were evidentiary errors that prejudicially infringed his federal constitutional confrontation right.[5] Respondent

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[5] Numerous cases are currently pending in our Supreme Court concerning the right of confrontation under the Sixth Amendment when the results of forensic tests performed by scientists who did not testify are admitted and the effect of *Melendez-Diaz* on California jurisprudence, specifically *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*). These pending cases include: *People v. Dungo*, S176886, review granted December 2, 2009, formerly published at 176 Cal.App.4th 1388; *People v. Gutierrez*, S176620, review granted December 2, 2009, formerly published at 177 Cal.App.4th 654; *People v. Rutterschmidt*, S176213, review granted December 2, 2009, formerly published at 176 Cal.App.4th 1047; *People v. Lopez*, S177046, review granted December 2, 2009, formerly published at 177 Cal.App.4th 202; *People v. Anunciation*, S179423, review granted March 18, 2010; *People v. Schwartz*, S1080445, review granted March 20, 2010; *People v. Benitez*, S181137, review granted May 12, 2010; and *People v.*

*[Fn. continued.]*

argues these claims were forfeited by the absence of contemporaneous objection at trial. Respondent is correct.

Defense counsel did not object on any ground to admission of Dr. Kohlmeier's testimony about the contents of the autopsy report or opinion testimony based, in part, on the contents of the autopsy report.

Also, appellant did not raise any confrontation clause objection to the admission of physical evidence collected at the crime scene. Defense counsel did not contend there was a gap in the chain of custody of the physical evidence recovered at the crime scene. Defense counsel did not ask Sergeant Mendoza or Detective Echevarria any questions about Melton. He did not argue that Melton's testimony was necessary or subpoena this witness.

"'No procedural principle is more familiar to [the United States Supreme Court] than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" (*United States v. Olano* (1993) 507 U.S. 725, 731.)

This principle is codified in the California Evidence Code: "[¶] A judgment will not be reversed on grounds that evidence has been erroneously admitted unless 'there appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so *stated as to make clear the specific ground of the objection or motion* ....' (Evid. Code, § 353, subd. (a). Italics added.) Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable

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*Bowman*, S182172, review granted June 9, 2010, previously published at 182 Cal.App.4th 1616.

the party proffering the evidence to cure the defect in the evidence. [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 853-854.)

"[¶] … An appellate contention that the erroneous admission or exclusion of evidence violated a constitutional right is not preserved in the absence of an objection on that ground below. [Citations.]" (*People v. Daniels* (2009) 176 Cal.App.4th 304, 320, fn. 10; see, e.g., *People v. Micham* (1992) 1 Cal.4th 1027, 1044.) A claim that the introduction of evidence violated the defendant's rights under the confrontation clause must be timely asserted at trial or it is forfeited on appeal. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19; *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People v. Chaney* (2007) 148 Cal.App.4th 772, 777-780.)[6]

*Melendez-Diaz* addressed the defendant's obligation to preserve review of confrontation clause issues, stating "[t]he defendant *always* has the burden of raising his Confrontation Clause objection …." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2541.) Also, "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections. [Citation.]" (*Id.* at p. 2534, fn. 3.)

Appellant argues his failure to object should be excused because *Geier* was the controlling precedent at the time of trial, and *Melendez-Diaz's* analysis of the Sixth Amendment could not have been anticipated. We are not persuaded.

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**6** "Over the years, cases have used the word [waiver] loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right. '[T]he terms "waiver" and "forfeiture" have long been used interchangeably. The United States Supreme Court recently observed, however: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' [Citations.]" [Citation.]' [Citation.]" (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.)

*Crawford* was the governing law at the time of appellant's trial. *Melendez-Diaz* stated its ruling involves a "rather straightforward application of our holding in *Crawford*." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2533.) *Melendez-Diaz* clearly held that it was only "faithfully applying *Crawford* to the facts of this case." (*Ibid*.) It strongly rejected the dissent's assertion that the majority was "overruling 90 years of settled jurisprudence." (*Ibid*.)

Therefore, since *Crawford* was decided prior to appellant's trial, we conclude that the general rule requiring contemporaneous objection applies in this case. Because appellant did not object at trial, the confrontation clause claims presented for the first time on appeal were forfeited.

**III. The ineffective assistance claim fails for lack of prejudice.**

Alternatively, appellant argues defense counsel was ineffective because he did not object to admission of testimony about the autopsy report or challenge admission of the physical evidence based on a violation of the confrontation clause. We are not convinced. As will be explained, the ineffective assistance claim fails because appellant has not demonstrated prejudice.

The law governing direct appellate review of ineffective assistance claims is axiomatic:

> "First, a defendant must show his or her counsel's performance was 'deficient' because counsel's 'representation fell below an objective standard of reasonableness [¶] ... under prevailing professional norms.' [Citations.] Second, he or she must then show prejudice flowing from counsel's act or omission. [Citations.] We will find prejudice when a defendant demonstrates a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.] 'Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense

attorney would make.' [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611.)

When an ineffective assistance claim can be resolved solely on the absence of prejudice there is no need to determine whether counsel's alleged failings constituted deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *In re Jackson* (1992) 3 Cal.4th 578, 604.)

Further, reviewing courts will reverse on the ground of inadequate counsel only if the appellate record affirmatively establishes counsel did not have a rational tactical purpose for the challenged act or omission. (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) There is strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The defendant must overcome the presumption that, under the circumstances, the challenged action or action might be considered sound trial strategy. (*Strickland v. Washington, supra,* 466 U.S. at p. 689; *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

An attorney can choose not to object to admission of evidence for many reasons. The absence of objection "'"… rarely establishes ineffectiveness of counsel" [citation].' [Citation.]" (*People v. Gurule, supra,* 28 Cal.4th at pp. 609-610.) Counsel does not have a duty to make futile or frivolous objections. (*People v. Memro* (1995) 11 Cal.4th 786, 834, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) The failure to object is considered a matter of trial tactics "as to which we will not exercise judicial hindsight. [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

We have examined the record carefully and conclude the ineffective assistance claim can be resolved on the basis of lack of prejudice. It is not reasonably probable that the jury would have returned a more favorable verdict in the absence of testimony about the contents of the autopsy report. Since Detective Echevarria testified that he was handed a .22 long rifle slug at the autopsy and appellant admitted possessing a .22-

caliber semiautomatic handgun and firing it at the Eucalyptus house, there was no dispute about Garavito's cause of death or the identity of the assailant.

Appellant makes much of the testimony concerning the presence of soot around the wound and the distance of the gun barrel from Garavito's chest when it was fired. We do not believe such testimony was particularly crucial. Appellant has not demonstrated how this testimony adversely affected his ability to prove self-defense. Having examined the entirety of the evidence, we believe it is not reasonably probable that a more favorable verdict would have been returned if Dr. Kohlmeier had not offered the contested testimony.

Appellant's claim that he was prejudiced by the absence of Officer Melton's testimony is even less convincing. Appellant asserts the bullet casings found at the crime scene could have been moved before they were marked and collected. This assertion is purely speculative. The police responded quickly to the shooting. There is nothing in the appellate record indicating the crime scene might not have been secured properly or that any of the physical evidence might have been moved before it was marked and collected.

In sum, appellant admitted possessing the firearm and ammunition. He testified that he fired the weapon in self-defense. The jury did not find appellant guilty of murder and attempted murder; only manslaughter and attempted manslaughter. It found the gang enhancements attached to the homicide counts not true. We do not believe a reasonable jury would have returned a more favorable verdict in the absence of the alleged confrontation clause/evidentiary errors. Therefore, appellant has not

demonstrated any prejudice arising from counsel's failure to object on this ground and his ineffective assistance claim fails.[7]

**DISPOSITION**

The judgment is affirmed.

_____
Levy, Acting P.J.

WE CONCUR:

_____
Hill, J.

_____
Poochigian, J.

[7] Having carefully examined the appellate record, we also conclude that if we had addressed the merits of the confrontation clause claims raised by appellant, we would have found the alleged errors to be harmless beyond a reasonable doubt.